LIBRARY
SUPREME COURT, U. S.

MAY 24 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1383

PAUL E. REPASS,

Petitioner,

vs.

ALBERT L. VREELAND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAMS, WILLETTE & FACCONE,
Attorneys for Respondents,
3 No. Arlington Avenue,
East Orange, New Jersey, 07017.

PETER A. WILLIAMS,
Of Counsel.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
OPINION AND JUDGMENT BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	2
COUNTER-STATEMENT OF CASE	3
ARGUMENT:	
Point I—A client cannot recover in an action against attorneys for malpractice alleging that the attorneys were negligent in allowing an action to be barred by the Statute of Limitations, if the action was barred by the Statute of Limitations prior to the time the attorneys were retained	9
Point II—The petitioner's cause of action against Kelly-Koett Co. and its successors in action, Keleket X-ray Corp. and Tracer Lab, Inc., was barred by the New Jersey Statute of Limitations (N.J.S.A. 2A:14-2) prior to the time that the petitioner retained the respondent attorneys	11
Point III—The Federal Court does not have power to reconsider New Jersey's interpretation of N.J.S.A. 2A:14-2 and should not do so on the facts before the Court	16
CONCLUSION	19

PAGE

Cases Cited

Allison v. Missouri Power & Light Co., 59 S. W. 2d 771 (Misso. 1933) 18

Biglioli v. Durotest Corp., 44 N. J. Super. 93, 129 A. 2d 727 (1957), 26 N. J. 33, 138 A. 2d 529 (1958 .. 13

Blackmon v. Govern, 138 Fed. Supp. 884 (D. C. N. J. 1956) 12

Buck v. Mouradian, 100 So. 2d 70 (Fla. 1958) 15, 18

City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954) ... 15

DeFeo v. Peoples Gas Co. of N. J., 6 N. J. Misc. 790, 142 A. 756 (1928) 13

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 16

Fernandi v. Strully, 35 N. J. 434, 173 A. 2d 277 (1961) 13, 14, 15, 18

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940) 16

Field v. Gazette Publishing Co., 59 S. W. 2d 9 (Ark. 1933) 18

Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945) 16

Hotelling v. Walther, 69 Ore. 559, 130 Pac. 2d 944 (1942) 15

Housing Authority of Union City, etc. v. Commonwealth Trust Co., 25 N. J. 330, 136 A. 2d 401 (1957) 12

Hughes v. Eureka Flint & Spar Co., Inc., 20 N. J. Misc. 314, 26 A. 2d 567 (1939) 13, 15

Hutchinson v. Semler, 361 P. 2d 803 (1961) 18

PAGE

Moore v. Illinois Central Railroad Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941) 16

Piukkula v. Pillsbury Astoria Flouring Mills Co., 150 Ore. 340, 42 Pac. 2d 921 (1935) 15, 18

Reinhardt v. Wilbur, 30 N. J. Super. 502, 105 A. 2d 415 (1954) 15

RePass v. Keleket X-ray Corp., et al., 212 Fed. Supp. 406 (D. C. N. J. 1962) 9, 13

Shaw v. U. S. Fidelity & Guaranty Co., 101 F. 2d 92 (3rd Cir. 1938) 12

Urie v. Thompson, 337 U. S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018 (1949) 15

Statute Cited

N.J.S.A. 2A:14-2 .....2, 3, 11, 12, 16

Other Authorities Cited

34 Am. Jurisprudence:

126, Sec. 160 18

Attorney Malpractice, 63 Columbia L. R.:

1292, 1307 10

53 C. J. S., Limitations of Actions:

Sec. 1 (b) 1, n. 19 12

54 C. J. S.:

140, Sec. 174 18

PAGE

Development in the Law—Statutes of Limitations, 63 Harv. L. R.:

1177, 1185, 1237 ..... 13, 18

Estep and Van Dyke Radiation Injuries: Statute of Limitations' Inadequacies in Tort Cases, 62 Mich. L. R.:

pp. 753, 767-768 ..... 16, 17

1 Moore's Federal Practice:

3301, 02 16

3328 16

Prosser, Torts:

p. 165 9

2 Wood, Limitations of Actions:

765, Sec. 30 18

IN THE

Supreme Court of the United States

No.

PAUL E. RE PASS,

Petitioner,

vs.

ALBERT L. VREELAND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

To the Honorable the Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

The respondents in opposition to petition for a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Third Circuit made and entered by said Court on the 31st day of January 1968, respectfully show to this honorable court:

Opinion and Judgment Below

No official report has as yet been made of the opinion rendered by the Court of Appeals. A copy of said opinion is set forth in the petitioner's brief at Appendix III.

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1968.

The jurisdiction of this Court to review the judgment in question by writ of *certiorari* is Title 28 of the United States Code, Section 1254(1).

Statute Involved

The New Jersey Statute is N.J.S.A. 2A:14-2 (the New Jersey Statute of Limitations in negligence actions), which provide as follows:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this State shall be commenced within two years after the cause of any action shall have accrued."

Counter-Statement of Questions Presented for Review

1. May a client recover in an action against attorneys for malpractice where the client suffered no damage as a result of the attorneys' acts?

2. Was the petitioner's action against Kelly-Koett Company and its successors in action, Keleket X-ray Corp. and Tracer Lab, Inc. barred by the New Jersey Statute of Limiitations, when the petitioner retained the respondent attorneys?

3. Did the New Jersey Statute of Limitations (N.J.S.A. 2A:14-2) accrue when the petitioner knew or had reason to know that he had an injury to his hand and that the injury was caused by X-rays emitted from the X-ray machine purchased from Kelly-Koett Company and its successors in action, Keleket X-ray Corp. and Tracer Lab, Inc.?

4. May the Federal Court adopt a rule of law interpreting the New Jersey Statute of Limitations (N.J.S.A. 2A:14-2) in a case where jurisdiction is based on diversity of citizenship, not involving a federal question, contrary to a rule of law adopted by New Jersey Courts?

5. May the Federal Court, in the matter before the Court, decree that the petitioner's cause of action did not accrue until February 9, 1959?

Counter-Statement of Case

This is a suit for malpractice brought by the petitioner, Paul E. RePass, a physician, against the respondents, Albert L. Vreeland and Leonard B. Brown, individuals, and Vreeland & Brown, a New Jersey partnership in the practice of law.

On May 25, 1964, the respondents brought a motion for partial summary judgment as to that portion of the matter pertaining to damages for personal injuries on the ground that the petitioner's claim for damages for personal injury arising out of his alleged injury failed to state a cause for action in that the petitioner sustained no damages as a result of any acts performed by the respondents in that the Statute of Limitations ran prior to the time that the respondents were engaged in the said matter. By order dated January 18, 1965, the Honorable Anthony T. Augelli, J.U.S.D.C., granted the said motion (Pet. Appendix II).

The Court holding that the facts "show beyond doubt that plaintiff's cause of action for negligence has accrued at the latest in 1947, and that therefore the applicable period of limitation expired long prior to the time plaintiff retained defendants as his counsel in 1960."

From the order dated January 18, 1965, the petitioner first appealed to the United States Court of Appeals for the Third Circuit.

On January 31, 1966, the Court of Appeals dismissed the appeal on the grounds that it lacked jurisdiction to review an order that was not final.

Thereafter, the District Court, on January 9, 1967, granted summary judgment in favor of the respondents "on the whole of the cause of action in the plaintiff's complaint" (Pet. Appendix II). From this order of the District Court there was a second appeal to the United States Court of Appeals for the Third Circuit. The Court of Appeals on January 31, 1968 affirmed the judgment of the District Court. In its opinion the Court of Appeals held

> "On the present record, the plaintiff was last subjected to harmful emissions from the X-ray machine in 1942, the year in which he sold it. By his own admission he knew by 1947 that he was suffering from persistent X-ray dermatitis to an extent that precluded the continuation of his engagement in general practice and surgery. Therefore, we agree with the District Court that under New Jersey law, the Statute of Limitations began to run in 1947, if not before."
>
> "The only alleged wrong with which this appeal is concerned is the defendant's failure to file suit before the Statute of Limitations had run. But they could not have done otherwise, since the Statute had run before they were retained as counsel."

The petitioner, Dr. Paul E. RePass, is a licensed physician, residing and practicing in Denver, Colorado. He graduated from medical school in 1927 and after an internship in the Navy, began practicing medicine as a general practitioner. In 1928 he opened his office in East Orange, N. J., having his offices on Washington Street. In 1932 he moved to the Professional Building on Harrison Street in East Orange where he practiced until 1939 when he moved his office to 85 South Harrison Street in East Orange. He practiced there until 1942 when he went into the Navy. He was discharged in 1946 and opened up his practice in Denver, Colorado.

In 1932 he purchased an X-ray machine which he referred to as a "fluoroscopy combination" from a man named Akers who was a representative of the Kelly-Koett Company. He no longer has the actual receipts of the purchase of that machine. In the beginning he used the machine solely for fluoroscoping patients, but in 1939 when he moved his office to South Harrison Street, he installed X-ray tanks and thereafter also used the machine for X-ray purposes. At that time he disconnected the machine and had movers move the machine and he reconnected it. Sometime between 1944 and 1946 the said X-ray machine was sold to a Dr. Wheaton of Verona. The last time that the petitioner used the machine was in 1942.

In either 1939, 1940 or 1941, the petitioner noticed that he had little keratosis, a little roughening of the skin on his hand. He noticed it more particularly after his move to 85 South Harrison Street. The condition resembled small irregularities like little warts. At that time he had no idea as to what it was. He would mention it to his colleagues, but sought no formal consultation.

From 1939 to 1941 the warts were fulgrated by a high frequency current and they would go away but then later a

new one would appear somewhere else on the hand. During this period of time, the petitioner was doing surgery and obstsetrics and was having no trouble scrubbing his hands. The condition would recur once in several months (P110a). During the time referred to there were gradual changes taking place on his hand but he did not consider them serious. When he went into the Navy in 1942 he still had this condition (P111a). While in the Navy a slight dryness and roughness was present.

In 1939 while moving the machine he discovered that the machine was unprotected. He noticed that the cone was made only of sheet metal and had no lead in it. Thereafter he wore gloves when using the machine. He has not seen the Kelly-Koett machine since 1942. He did, however, in the 1940's, call Dr. Wheaton, the purchaser, to warn him that it was an unprotected machine and that he was always to use gloves and an apron when he used it. Dr. Wheaton disposed of the machine some time in 1959. An attempt was made to locate the machine but it was not successful.

When the petitioner was ready to resume practice after his discharge from the Navy, the cracks that were developing on his hand were hard to heal. This condition caused him to abandon general practice where he would have to scrub frequently for surgery. The condition of his hands had a lot to do with his specializing in radiology when he was discharged from the Navy.

After leaving the service he went to the University of Colorado and worked in the X-ray department in order to fulfill the requirements of the Board of Radiology to become a special skin radiologist. While in the Navy he also took a course in radiology at Bethesda. During the time that he was at the X-ray school the condition of his hands remained the same—some dryness, some little roughness, some ridging of the nails.

Prior to 1945 the petitioner was familiar with the problem of an overdose of X-ray radiation and the signs of an overdose of X-ray radiation. He knew what the signs of an overdose of X-ray radiation were—dryness of the skin, a little increase in the thickening of the superficial layers of the skin and ridging of the nails.

At oral depositions taken on October 18, 1963, the petitioner testified as follows:

> "Q. You had this knowledge prior to 1945 did you not? A. I believe it was along this period that I did realize that I had too much X-ray in my left hand, yes.
>
> Q. As I understand your testimony, it was somewhere around 1945 that you realized that the condition which you had was from an overdose of X-ray? A. It was still a minor condition and I wasn't concerned with it.
>
> Q. But somewhere in your mind it was recorded that perhaps this minor condition was being caused by an overdose of X-ray? A. Yes. I had thought back to the time that I had not used gloves because I did not think gloves were necessary. I had been led to believe that they were unnecessary and it stuck in my mind what must have happened.
>
> Q. This was about 1945 when you reconstructed this in your mind? A. Well, 1945 would be included in this period. I can't say exactly when it came about.
>
> Q. It might have been before 1945? A. It might have occurred to me."

The petitioner also testified at the said deposition:

> "Q. But I just want to clear up your prior statement. Sometime between the general area of the

mid-1940's it had dawned upon you in reflection, that the minor condition that was present in your hand was as a result of an overdose of X-ray radiation; isn't that correct? A. That is correct.

Q. You formed the opinion at that time that you probably got it by not using the gloves because the man from Kelly-Koett told you that the gloves were unnecessary? A. That is right; it was limited to my left hand."

After 18 months at the University of Colorado he was eligible to take the examinations of the American Board of Radiology. While at the University of Colorado the condition was still present. He discussed it with other doctors who informed him that the condition was X-ray dermatitis. This was during 1946 and 1947. At that time there was no doubt in his mind that the condition was caused by not wearing gloves in the earlier years when he was using the unprotected X-ray machine.

After his training at the University of Denver he practiced radiology at Binghamton, N. Y. The condition of his hand still existed to the extent that he accepted the condition as a permanent one. During the 1946-1947 period, he knew of the possibility that the condition might get worse. After Binghamton, he returned to Denver, Colorado and opened a medical practice, specializing in radiology.

Between 1939 and 1958, the condition in his hand gradually became worse. It started from a dryness and a few little keratotic areas to becoming cracked. In 1959 one of the areas which had persisted for a little longer than usual was biopsied and found to be a basic cell carcinoma and for that reason the finger was removed.

On March 2, 1959 the petitioner retained Jerome R. Strickland, Esq., a Denver attorney, to represent him in

an action for negligence against the manufacturer and distributor of the defective X-ray machine. On May 20, 1960, Mr. Strickland forwarded the file to respondent Vreeland. Suit was commenced against Keleket X-ray Corp. by filing a complaint on August 7, 1961, more than two years after the diagnosis of the malignancy on Feb. 9, 1959.

ARGUMENT

POINT I

A client cannot recover in an action against attorneys for malpractice alleging that the attorneys were negligent in allowing an action to be barred by the Statute of Limitations, if the action was barred by the Statute of Limitations prior to the time the attorneys were retained.

Among other defenses in this matter, the respondents denied that the petitioner had sustained any damages as the result of the alleged acts of the respondent attorneys. In the prior suit (*Re Pass* v. *Keleket X-ray Corp., et al.*, 212 Fed. Supp. 406 (D. C. N. J. 1962)) the Statute of Limitations was raised as a defense by the defendant and was the reason for the granting of the summary judgment dismissing that matter.

The elements necessary to prove a cause of action based on negligence are: (a) a legal duty to conform to a standard of conduct for the protection of others against unreasonable risks, (b) a failure to conform to the standard, (c) a reasonably close causal connection between the conduct and the resulting injury or damage, and (d) actual loss or damage resulting to the interests of another. (See Prosser on Torts, pg. 165.)

In order to prevail in such an action, each and every element must be proved. Even if there was a violation of the duty owed, there can be no recovery unless there is damage or loss. Proof that an attorney has violated a legal duty owed to a client does not necessarily result in an imposition of liability. Courts have repeatedly denied recovery when a plaintiff client failed to prove that he sustained actual damages. *Attorney Malpractice,* 63 Columbia L. R. 1292, 1307.

Thus the Trial Court in fact concluded the action was barred by the Statute of Limitations prior to the time the respondents were retained holding *inter alia* in its January 18, 1965 opinion:

> "I am satisfied on the basis of undisputed facts, that plaintiff's cause of action against the manufacturer of the X-ray machine accrued in 1945, at which time he realized his condition was caused by 'too much X'ray on my left hand' and that his failure to wear gloves was responsible for the condition, or at the latest in 1947, when plaintiff was told by doctors in Colorado that he was suffering from X-ray dermatitis. In any event, it is clear that the cause of action was outlawed many years before plaintiff consulted defendants."

The Court of Appeals in affirming the Trial Court's judgment held *inter alia*:

> "The New Jersey statute, like many others, makes the period of limitations begin to run at the time that the cause of action 'shall have accrued'. In some exceptional situations the New Jersey courts postpone the running of the statute until the wronged person becomes aware that the wrong has occurred and has caused him harm. *Fernandi* v.

> *Strully,* 1961, 35 N. J. 434, 173 A. 2d 277. However, even if that doctrine is applicable here, there is no suggestion in the New Jersey decisions that, once the injured person is aware that the wrong has occurred and has caused him significant harm, the running of the statute can be further postponed until some unanticipated more serious condition or consequential damage results or is discovered. Indeed, even the jurisdictions most favorably disposed toward relaxing the stringency of statutes of limitations have not ruled that a cause of action accrues any later than first awareness that the wrong has caused significant harm. See *Developments In The Law—Statute Of Limitations,* 1950, 63 Harv. Law Rev. 1177, 1200-07."

It must therefore be concluded that where the Statute of Limitations had run on the petitioner's claim against the X-ray company prior to the time the respondent attorneys had been retained by petitioner, there can be no recovery because there is no actual loss or damage.

POINT II.

The petitioner's cause of action against Kelly-Koett Co., and its successors in action, Keleket X-ray Corp. and Tracer Lab, Inc., was barred by the New Jersey Statute of Limitations (N.J.S.A. 2A:14-2), prior to the time that the petitioner retained the respondent attorneys.

There is no dispute that since jurisdiction in this matter arises out of diversity of citizenship and no Federal Statute is involved, the period of limitations within which an action such as this may be brought is fixed by the New

Jersey Statute, *Shaw* v. *U. S. Fidelity & Guaranty Co.*, 101 F. 2d 92 (3rd Cir. 1938); *Blackmon* v. *Govern*, 138 Fed. Supp. 884 (D. C. N. J. 1956).

N.J.S.A. 2A:14-2 provides that:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or of any person within this State shall be commenced within two years after the cause of any such action shall have accrued."

In *Housing Authority of Union City, etc.* v. *Commonwealth Trust Co.*, 25 N. J. 330, 136 A. 2d 401 (1957), the New Jersey Supreme Court has stated the purposes of Statutes of Limitation as follows:

> "These Statutes create repose. They are practical and pragmatic devices to spare the Courts from litigation of stale claims and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314, 65 Sup. Ct. 1137, 1142, 89 L. Ed. 1628 (1945) quoted in *State by Parsons* v. *Standard Oil Co.*, 5 N. J. 281, 295, 74 A. 2d 565 (1955). Their primary purpose is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend. History shows the first Statutes of Limitation were passed by the English Parliament when 'abuses from stale demands became unendurable'. 1 Wood, Limitations of Actions, Sec. 2."

See also 53 C. J. S., Limitations of Actions, Sec. 1 (b) 1, note 19:

> "The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of sale claims in time comes to prevail over the right to prosecute them."

See also *Development in the Law—Statutes of Limitations,* 63 Harv. L. R. 1177, 1185, 1237.

The prevailing rule in New Jersey is that a plaintiff has two years from the date when his cause of action accrues within which to commence his suit. Except for certain exceptions. (*Fernandi* v. *Strully,* 35 N. J. 434, 173 A. 2d 277 (1964); *Biglioli* v. *Durotest Corp.,* 44 N. J. Super. 93, 129 A. 2d 727 (1957); 26 N. J. 33, 138 A. 2d 529 (1958); *Hughes* v. *Eureka Flint & Spar Co., Inc.,* 20 N. J. Misc. 314, 26 A. 2d 567 (1939); *De Feo* v. *Peoples Gas Co. of N. J.,* 6 N. J. Misc. 790, 142 A. 756 (1928), a cause of action accrues upon the conjunction of two events, a wrongful act and injury resulting therefrom. *Re Pass* v. *Kelekèt X-Ray Corp.,* 212 Fed. Supp. 406, D. C. N. J. 1962; *Fernandi* v. *Strully,* 35 N. J. 434, 173 A. 2d 277 (1961).

Fernandi v. *Strully, supra,* sets forth one of the exceptions. This case is applicable to medical malpractice cases involving a foreign object. There the New Jersey Supreme Court set forth the rule as follows:

> "For present purposes we need not question those instances for we are satisfied that the case at hand falls within a special grouping or 'class of cases' (1 Wood, supra, at pages 685, 686) where the period of limitations may and should fairly and justly be said to begin to run when the plaintiff knows or has any reason to know about the foreign object and the existence of the cause of action based upon its presence . . ."

Even if we assume that the case before the Court falls within a "special grouping or class of cases" as enunciated by Justice Jacobs in *Fernandi* v. *Strully, supra,* the petitioner's case must fail by reason of the running of the Statute of Limitations. Judge Augelli in his opinion dated January 18, 1965 found that:

> "In 1947 the X-ray machine could have been located. An examination would have disclosed any fault in its construction. Now the machine cannot be located and only a similar model can be produced. The non-use of protective gloves and the representations made with respect thereto go back more than 30 years. A timely suit by plaintiff would have resulted in a professional evaluation of the nature of the plaintiff's injury and the cause thereof. There is nothing in the record of the cases examined by the Court, that lend support to plaintiff's contention that his cause of action did not accrue until his fingers were amputated in 1959."

The petitioner knew in 1945 that he had an injury to his hand which was caused by "too much X-ray in his left hand" and that his failure to wear gloves was responsible for the condition. In 1947 the petitioner was told by doctors in Colorado that he was suffering from X-ray dematitis (P168a). To characterize the injury as "de-minimus" in light of the petitioner's letter dated June 11, 1960 in which he sets forth the fact that the condition developed to such an extent when he left the Navy, that he had to abandon general practice so that he would not have to scrub frequently for surgery is not only unrealistic, as set forth in Judge Augelli's opinion but is false.

To hold that a plaintiff who knows that he has sustained an injury as the result of the negligent acts of another,

can sit on his rights until he has decided that the injury is ripe for as long as a period of 15 to 20 years would be contrary to the case law oft he State of New Jersey. See *Reinhardt v. Wilbur*, 30 N. J. Super. 502, 105 A. 2d 415 (1954).

In *Reinhardt* v. *Wilbur, supra,* the plaintiff sustained injuries in an automobile accident. As a result of negotiations between the parties, the claims were settled and a release was given. More than eight months after the execution of the release, the plaintiff became aware that she had sustained a fracture of the spine, a much more serious injury than originally thought to exist. The Court did not allow the release to be set aside so that the plaintiff could assert her final injury. To allow the petitioner here to do what he desires to do will reward a claimant who sat on his rights for a period of 15 to 20 years while not allowing a claimant who acted with diligence to do the same thing.

It is interesting to note that in other jurisdictions accepting a theory of law similar to *Fernandi* v. *Strully, supra,* the theory set forth by the petitioner herein has been rejected. See *Piukkula* v. *Pillsbury Astoria Flouring Mills Co.,* 150 Ore. 340, 42 Pac. 2nd 921 (1935) and *Hotelling* v. *Walther,* 69 Ore. 559, 130 Pac. 2nd 944 (1942). Compare also *City of Miami* v. *Brooks,* 70 So. 2nd 306 (Fla. 1954) and *Buck* v. *Mouradian,* 100 So. 2nd 70 (Fla. 1958).

Under any accepted test as to the date of accruing of the Statute of Limitations, the petitioner's claim must fail. See *Fernandi* v. *Strully, supra; Hughes* v. *Eureka Flint & Spar Co., Inc.,* 20 N. J. Misc. 314, 26 A. 2d 567; *Urie* v. *Thompson,* 337 U. S. 163, 93 Law Ed. 1282, 69 S. Ct. 1018 (1949).

POINT III

The Federal Court does not have power to reconsider New Jersey's interpretation of N.J.S.A. 2A:14-2 and should not do so on the facts before the Court.

The Federal Court does not have the power to reconsider interpretations of State Law as do the Appellate Courts of the State in which the decision is rendered. *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079 (1945); *Moore* v. *Illinois Central Railroad Co.,* 312 U. S. 630, 61 Sup. Ct. 754, 85 L. Ed. 1089 (1941); *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

The Federal Court must even ascertain and apply State Law in a diversity case, when the State Statute of Limitations applies, even though State Law is not expounded by the highest State Court. Since the lower State Court is an organ of the State, its determination in the absence of more convincing evidence as to what State Law is, must be followed by the Federal Court. *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 Sup. Ct. 176, 85 L. Ed. 109 (11940); Moore's Fed. Practice 3301, 3302.

Where there is no applicable State Law, the Federal Court must consider analogous state decisions in order to determine State Law even though contrary to a decision of the Federal Supreme Court when exercising an independent judgment on the same point. 1 Moore's Federal Practice 3328.

The problem confronting the Court was considered and well stated in *Estep and Van Dyke Radiation Injuries: Statute of Limitations' Inadequacies in Tort Cases,* 62 Mich. L. R. 753, in an article dealing with liability from atomic radiation. The writer there at page 768 states:

> "On the other hand if limitations statutes were construed so as to commence running only after the plaintiff has notice of his ultimate injury (even though he knew of the exposure) perhaps 20 or 30 years after exposure, potential defendants are placed at a considerable disadvantage. The plaintiff knowing that he has been exposed to a specific dose of radiation by the defendant can preserve his evidence, await development of any serious consequences, and then spring his claim on the defendant who will obviously be hard-pressed to defend adequately against a suit. Not only is there a danger of spurious claims being brought under these circumstances but the fact that radiation induced injuries are non-specific also creates the distinct possibility of recoveries for injuries which were not caused by the defendant."

The writer in 62 Mich. L. Rev. 753 at page 767 criticizes the approach that the Statute of Limitations in radiation cases should run when the disease is diagnosed because "it is susceptible to abuse by a plaintiff who is aware of the symptoms foretelling his serious condition but who delays confirmation of his apprehension that he is suffering from a fatal disease."

The petitioner in the case before the Court asks the Court to accept a new theory as to when the Statute of Limitations accrues. There is no authority whatsoever in New Jersey for the acceptance of this theory. This is not an "inheritantly unknowable case" and substantial harm accrued at least as early as the date when the petitioner left the United States Navy and had to give up general practice and surgery because of the condition of his hand. A diligent research of the law does not turn up one case in any jurisdiction, nor does the petitioner cite in his brief one case that lends support to his contention that his

cause of action did not accrue until his fingers were amputated in 1959.

As stated in 34 Am. Jurisprudence 126, Sec. 160:

> "As a general rule, where an injury, although slight, is sustained in consequence of the wrongful act of another and the law offers a remedy therefor, the Statute of Limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the Statute is not postponed by the fact that the actual or substantial damages do not occur until a later date."

In 2 Wood, Limitations of Actions, 765 Sec. 30 (a source given great weight in *Fernandi* v. *Strully, supra*) it is set forth that in actions from injuries resulting from the negligence or unskillfulness of another, the Statute attaches and begins to run from the time when the injury was first inflicted and not from the time when the full extent of the damages has been ascertained.

In the jurisdictions that have considered this question, the theory supported by the petitioner was not followed. See *Buck* v. *Mouradian, supra; Piukkula* v. *Pillsbury Astoria Flour & Mills Co., supra; Hutchinson* v. *Semler,* 361 P. 2d 803 (1961); *Field* v. *Gazette Publishing Co.,* 59 S. W. 2nd 19 (Ark. 1933); *Allison* v. *Missouri Power & Light Co.,* 59 S. W. 2nd 771 (Misso. 1933); 54 C. J. S. 140, Sec. 174. The purpose of a Statute of Limitations must be clearly kept in mind. It is as stated in 62 Harv. L. Rev. 1177 at page 1185:

> "The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in

his reasonable expectation that the slate has been wiped clean of ancient obligations and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded and witnesses have disappeared'."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAMS, WILLETTE & FALCONE,
Attorneys for Respondent.

PETER A. WILLIAMS,
Of Counsel.

CERTIORARI DENIED